Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

77-1131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ....., Misc.

In the matter of

THE VENDO COMPANY, a Missouri corporation,
Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS AND PETITION FOR MANDAMUS

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In the matter of

THE VENDO COMPANY, a Missouri corporation,

Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Petitioner, The Vendo Company, respectfully moves the Court for leave to file the petition for writ of mandamus annexed hereto. The reasons for granting this motion are stated in the petition.

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Dated: February 10, 1978

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OCTOBER TERM, 1977

No. ....., Misc.

In the matter of

THE VENDO COMPANY, a Missouri corporation,

Petitioner.

PETITION FOR WRIT OF MANDAMUS

Petitioner prays that a writ of mandamus issue to the Honorable Stanley J. Roszkowski, Judge, United States District Court for the Northern District of Illinois, Eastern Division, directing him to formally dissolve the preliminary injunction which this Court, in *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S.Ct. 2881 (1977), held was prohibited by statute (28 U.S.C. § 2283).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a). Service of the motion and petition has been made on Judge Roszkowski as well as the respondents in *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S.Ct. 2881 (1977).

STATEMENT

At issue in *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S.Ct. 2881 (1977), was a preliminary injunction prohibiting Vendo's collection of final judgments of $7.5 million previously awarded to Vendo by the Illinois state courts, and unanimously affirmed by the Supreme Court of Illinois, against two of the respondents in the federal case, Harry B. Stoner

and Stoner Investments, Inc. While the plurality and concurring opinions differed as to the grounds for their conclusion that the injunction was barred by § 2283, all of the Justices subscribing to those opinions (constituting a majority of this Court) agreed that, in the circumstances of the case and as a matter of law, no exception to the statute was applicable. The case was accordingly "[r]eversed and remanded."

The respondents subsequently filed a petition for rehearing and a motion in this Court requesting a stay of the Court's mandate pending consideration of their petition. The motion for stay was presented to Justice Rehnquist and was denied by him on July 15, 1977. Respondents' subsequent reapplication to Justice Stevens for such a stay was denied by him on July 29, 1977, and the judgment of this Court issued on that date. The petition for rehearing was denied on October 3, 1977.

The Judgment of this Court, as issued by the Clerk (Appendix A), provided for reversal of the judgment of the lower court and, in terms routinely used for this purpose, ordered:

> "that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court."

On August 19, 1977, the Court of Appeals entered an order remanding the case to the District Court "for further proceedings, in conformity with the opinion of the United States Supreme Court rendered on June 29, 1977" (Appendix B).

Because of respondents' position that the injunction continued to be binding in spite of this Court's decision, Vendo thereupon filed a motion in the District Court asking that the preliminary injunction be formally dissolved. In response to petitioner's "position that we believe the injunction is not in force and effect" because of the Supreme Court's decision, the District Court stated:

> "I think so long as the injunction has not been dissolved, it is in force and effect. *I don't understand how it gets to be blown away becuse the Supreme Court said it should be blown away.* Until it is blown away it is still here." (Transcript, September 16, 1977, pp. 5-6; emphasis added.)

In their brief opposing Vendo's motion in the District Court, respondents urged the District Court to continue the preliminary injunction in effect indefinitely, arguing that such a result was permissible under their interpretation of this Court's opinions. In particular they contended, as they had in their motions for stay of this Court's mandate and their petition for rehearing, all of which were denied, that this Court had overlooked evidence in the preliminary injuction record.

The District Court declined to rule on petitioner's motion for dissolution of the injunction, and expressed uncertainty about the proper action to be taken on remand in light of the words "for further proceedings" in this Court's judgment. On the other hand, the District Court expressed the view that, notwithstanding this Court's reversal of the injunction and issuance of its opinion and judgment, the preliminary injunction is still in effect until dissolved, and any action by Vendo to collect its state court judgments would risk contempt.

On November 4, 1977, the case was reassigned from Judge Hubert L. Will to Judge Stanley J. Roszkowski, who was not sworn in as a Federal District Judge until approximately one month later. On November 16, 1977, Vendo filed in this Court a motion asking for clarification of this Court's judgment of June 29, 1977. On January 23, 1978, this Court denied the motion on the ground that the proper remedy for failure of a lower court to comply with a judg-

ment of the Supreme Court is by petition for mandamus. The denial was expressly without prejudice to the filing of such a petition. By letter dated January 25, 1978, petitioner sent Judge Roszkowski a copy of this Court's opinion of January 23 and requested that he enter an order granting Vendo's motion for dissolution of the injunction without delay.* Judge Roszkowski has, however, taken no action in the matter.

REASONS FOR GRANTING THE WRIT

On June 29, 1977, in *Vendo Co.* v. *Lektro-Vend Corp.*, 97 S.Ct. 2881, a majority of this Court held that the preliminary injunction granted by the District Court against Vendo violated the Anti-Injunction Act, 28 U.S.C. § 2283. While predicated on somewhat different grounds, both the plurality and concurring opinions of this Court undeniably reached that same conclusion. Accordingly, the decision of the Court of Appeals affirming the injunction was "reversed" and the case "remanded."

Notwithstanding that decision, notwithstanding the issuance of this Court's judgment after two denials of respondents' motion for stay, notwithstanding denial of respondents' petition for rehearing, and notwithstanding the pendency in the District Court, for over four months, of Vendo's motion for dissolution of the injunction, the injunction nevertheless still formally stands. While expressing itself in doubt as to the proper action to be taken on remand, the District Court nevertheless admonished Vendo that it regards the injunction as still in effect, and that any action by Vendo in violation of the injunction would risk contempt.

Vendo therefore requests that this Court require compliance with its decision in *Vendo* v. *Lektro-Vend,* stating

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* A copy of the text of Vendo's letter is annexed hereto as Appendix C.

expressly that the preliminary injunction should be dissolved forthwith, and if necessary issue a writ of mandamus to the District Court directing it to so act.*

This Court's Decision Clearly Requires Dissolution Of The Preliminary Injunction

A majority of this Court agreed that, in the circumstances of this case and as a matter of law, the District Court lacked the power to grant the preliminary injunction issued against Vendo because no exception to the Anti-Injunction Act was applicable. On that basis this Court "[r]eversed and remanded" the matter. Neither this Court's plurality opinion nor the concurring opinion contains any indication that the matter was to be remanded for additional findings or for a further hearing on the preliminary injunction issue while the injunction was kept in effect.

The plurality opinion held that § 16 of the Clayton Act does not under any circumstances expressly authorize injunctions against state court proceedings as an exception to the Anti-Injunction Act, and that no other exception to that Act was applicable. The two concurring Justices agreed that under the circumstances of this case no exception to the Anti-Injunction Act was applicable. They held

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* Vendo has applied to this Court for such relief, rather than to the Court of Appeals, because compliance with this Court's own decision is required. The Court of Appeals took no action on remand other than to further remand the matter to the District Court "for further proceedings in conformity with the opinion of the United States Supreme Court." (Appendix B.)

We feel confident that Judge Roszkowski, upon an express direction by this Court, would immediately comply therewith, without the necessity of actual issuance of the requested writ. *Cf. Bucolo* v. *Adkins,* 424 U.S. 641, 644 (1976); *United States* v. *Haley,* 371 U.S. 18, 20 (1962).

that § 16 may expressly authorize injunctions against state court proceedings only in the "narrowly limited circumstances" where those proceedings are part of a "pattern of baseless, repetitive claims" and thus constitute a "mere sham" under the *Noerr-Pennington* doctrine, as applied by *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972). And they determined that Vendo's state court case *did not and could not*—as a matter of law—fall within this "mere sham" exception. Noting that "the District Court failed properly to apply the *California Motor Transport* rule," the concurring opinion went on to hold that the District Court:

> "did not find a 'pattern of baseless, repetitive claims,' *nor could it have done so under the circumstances.* Only one state-court proceeding was involved in this case, *and it resulted in the considered affirmance by the Illinois Supreme Court of a judgment for more than $7 million.*" (97 S.Ct. at 2894; emphasis added.)

Accordingly, the concurring opinion concluded that § 16 of the Clayton Act "did not authorize the injunction below" and that "the state-court proceeding in this case should not have been enjoined by the federal court." (97 S.Ct. at 2893-94.)

It would be difficult to imagine a more definitive and conclusive determination of the injunction's invalidity and the District Court's lack of power to issue it. As Mr. Justice Stevens remarked in his dissenting opinion, "[the concurring opinion's] view that § 16 did not authorize the preliminary injunction entered by Judge McLaren is dispositive of this litigation." (97 S.Ct. at 2902.)

Clearly, upon issuance of this Court's decision and judgment and remand of the matter to the lower courts, formal dissolution of the preliminary injunction should have followed as a matter of course. However, the respondents have vigorously resisted entry of an order dissolving the injunction. Indeed, in opposing Vendo's motion in the District Court for dissolution of the injunction, respondents have contended that this Court's opinions actually permit indefinite continuation of the injunction in effect. The District Court, expressing doubt as to the proper course of action, has declined to grant Vendo's motion for dissolution, while admonishing Vendo concerning contempt sanctions in the event of any disobedience of the injunction, notwithstanding that this Court has pronounced the injunction invalid.

Respondents also contended in the District Court that their position was supported by the statement contained in this Court's judgment remanding the case "for further proceedings in conformity with the opinion of this Court." However, as this Court noted in its *per curiam* opinion of January 23, 1978 in *Vendo* v. *Lektro-Vend* (p. 1), that language is "customary in such documents." Under the circumstances, it is plain that an order dissolving the preliminary injunction is the only "further proceeding" on remand that would be "in conformity with" the opinions of this Court, apart from proceedings relating to the merits of respondents' treble-damage claims.

As this Court has expressly held, in a passage quoted at length in its January 23, 1978 opinion in *Vendo* v. *Lektro-Vend* (p. 3):

> "[w]hen a case has been once decided by this Court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter

> decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. . . . If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court." *In re Sanford Fork and Tool Co.*, 160 U.S. 247, 255 (1895).

Thus, in *Vendo* v. *Lektro-Vend,* the District Court is not free on remand to tamper with this Court's decision in any way, and in particular is not free to reconsider the evidence that was before this Court.

Yet such is precisely what the respondents have asked the District Court to do. Advancing essentially the same contentions as were made to this Court in their unsuccessful briefs on the merits, motions for stay of the mandate, and petition for rehearing, they have asked the District Court to continue the preliminary injunction in effect indefinitely. In effect, they have asked the District Court to grant the stay and the petition for rehearing which this Court denied. *And in that endeavor they have thus far succeeded, directly contrary to the June 29, 1977 decision of this Court.*

CONCLUSION

It is apparent that the District Court, on remand in *Vendo* v. *Lektro-Vend,* has failed to proceed "in conformity with" this Court's judgment. As a result, not only this Court's judgment but the Anti-Injunction Act and the important federal policies which it embodies have been further frustrated. Indeed, a decision of the highest court of the State of Illinois (a decision which this Court declined to review on certiorari) has been effectively nullified for three years by a preliminary injunction which this Court held over seven months ago was barred by the Anti-Injunction Act.

For the reasons stated, we therefore request that this Court direct compliance with its decision of June 29, 1977, and if necessary issue a writ of mandamus to the District Court commanding it to formally dissolve the injunction.

Respectfully submitted,

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Dated: February 10, 1978

Appendices

APPENDIX A

Supreme Court of the United States

No. 76-156

Vendo Company,

Petitioner,

v.

Lektro-Vend Corporation et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Seventh Circuit, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court.

It is further ordered that the said petitioner, Vendo Company, recover from Lektro-Vend Corporation et al. Nine Thousand Eight Hundred and Six Dollars and Fifty-five Cents ($9,806.55) for its costs herein expended.

June 29, 1977

Clerk's costs	$ 150.00
Printing of record	9,656.55
Total	$9,806.55

APPENDIX B

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

August 19, 1977

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon.

Hon.

LEKTRO-VEND CORP., etc., et al.,
Plaintiffs-Appellees,

Nos. 75-1792 and 75-1793 vs.

THE VENDO COMPANY, etc.,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 65-C-1755
Judge McLaren

This matter comes before the court on the "STATEMENT BY THE VENDO COMPANY OF ACTION TO BE TAKEN BY THIS COURT ON REMAND FROM THE UNITED STATES SUPREME COURT" filed herein on August 4, 1977, by counsel for the defendant-appellant and "STATEMENT OF PLAINTIFFS-APPELLEES, LEKTRO-VEND CORP., STONER INVESTMENTS, INC. AND ANN M. STONER, AS ADMINISTRATOR OF THE ESTATE OF HARRY B. STONER, DECEASED, OF THE ACTION TO BE TAKEN BY THIS COURT ON REMAND FROM THE UNITED STATES SUPREME COURT" filed herein by plaintiffs-appellees on August 8, 1977, pursuant to Circuit Rule 19 of this court. This court being fully advised in the premises,

IT IS ORDERED that the matter is REMANDED to the district court for further proceedings, in conformity with the opinion of the United States Supreme Court rendered on June 29, 1977.

APPENDIX C

[Letterhead of
Sonnenschein Carlin Nath & Rosenthal omitted.]

JANUARY 25, 1978

BY MESSENGER
Honorable Stanley J. Roszkowski
United States District Judge
Federal Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Re: LEKTRO-VEND CORP. et al. v. THE VENDO COMPANY, No. 65 C 1755

Dear Judge Roszkowski:

In light of Monday's *per curiam* opinion of the Supreme Court in this case, we urge Your Honor to grant forthwith the pending Motion for Dissolution of Preliminary Injunction filed by defendant, The Vendo Company, on September 14, 1977*. The motion was filed in this Court on remand from the Supreme Court's decision of June 29, 1977**. In that decision, the Supreme Court reversed the preliminary injunction entered by Judge McLaren in this case on June 30, 1975. In the plurality and concurring opinions, a majority of the Supreme Court agreed that the preliminary injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283, and therefore should not have been granted.

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* Also on file are a brief by plaintiffs in opposition to the motion and a reply brief filed by Vendo on October 3, 1977.

** *Vendo Co.* v. *Lektro-Vend*, 97 S.Ct. 2881 (1977).

On November 16, 1977, nearly a month before Your Honor was sworn in, Vendo filed a motion with the Supreme Court for clarification of its judgment. In Monday's *per curiam* opinion, a copy of which is enclosed, the Supreme Court denied the motion for clarification on the ground that the proper remedy for failure of a lower court to carry out a judgment of the Supreme Court is by petition for writ of mandamus, rather than on a motion for clarification, but emphasized that the action was without prejudice to Vendo's right to file such a mandamus petition.

In addition, the Supreme Court (p. 1) pointed out that, "while [the plurality and concurring] opinions did not agree in their reasoning, each of them concluded that the judgment of the Court of Appeals for the Seventh Circuit, which had in turn affirmed the issuance of an injunction by the District Court for the Northern District of Illinois, should be reversed." Significantly, the Court also stated (p. 3), quoting language from an earlier Supreme Court decision:

> "[w]hen a case has been once decided by this Court on appeal, and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree, is considered as finally settled. *The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate....*" (Emphasis added.)

Since a majority of the Supreme Court has agreed that the preliminary injunction issued in this case was prohibited by the Anti-Injunction Act, it is clear that the injunction must be dissolved. Nearly seven months have passed since the Supreme Court's decision; yet the injunction as a formal matter remains of record. As a result of Monday's opinion by the Supreme Court, we are reluctantly left with no alternative except to proceed with mandamus unless the injunction order is dissolved pursuant to our motion in this Court. We urge Your Honor to grant such relief forthwith.

For the Court's convenience, we also enclose another copy of our proposed form of order.

Respectfully submitted,

Earl E. Pollock
Gary Senner
Miriam B. Steinberg
Philip A. Haber
Attorneys for
The Vendo Company

Encs.
cc: Barnabas F. Sears
James E. S. Baker
Lambert M. Ochsenschlager